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CITIMORTGAGE, INC.**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

VICTOR TINOCO,

Plaintiff,

V.

WACHOVIA BANK; WORLD SAVINGS BANK; WELLS FARGO BANK; JOE VILLARREAL PALMA; JOSE V. PALMA, INC.; PRUDENTIAL CALIFORNIA REALTY; REALTY WORLD COUNTYWIDE; VICTORIA MORTGAGE; JOSE REYES; RAMIRO ALCALA; CHICAGO TITLE CO.; INDYMAC BANK; CITIMORTGAGE; ATLAS MORTGAGE SERVICES; ROBERT FERNANDEZ; STEWART TITLE GUARANTY CO.; and DOES 1-100.

Defendants.

Case No. 5:09-cv-03363-PVT

Action Filed: May 14, 2009

**NOTICE OF MOTION AND MOTION TO
DISMISS PLAINTIFF'S COMPLAINT OR
IN THE ALTERNATIVE MOTION FOR A
MORE DEFINITE STATEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF SAME**

[F.R.C.P. 12(b)(6) and F.R.C.P. 12(e)]

DATE: September 22, 2009

TIME: 10:00 a.m.

CTRM: 5

Defendant CITIMORTGAGE, INC. (erroneously sued as “CitiMortgage”) (hereinafter “CMI”) hereby submits the following Notice of Motion and Motion and Memorandum of Points and Authorities in Support of its Motion to Dismiss for Failure to State a Claim or in the alternative a Motion for a More Definite Statement of the First Amended Complaint (“FAC”) filed herein by Plaintiff VICTOR TINOCO (“Plaintiff”) on May 14, 2009.

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1 **NOTICE OF MOTION AND MOTION**2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that the hearing on CMI's Motion to Dismiss the May 14, 2009
 4 FAC filed by Plaintiff, will come on regularly for hearing on September 22, 2009, at 10:00 a.m., or
 5 as soon thereafter as this matter may be heard, in Courtroom 5 of the above-mentioned court, located
 6 at 280 South 1st Street, San Jose, California.

7 The Motion to Dismiss is based on this Notice of Hearing, the supporting Memorandum of
 8 Points and Authorities, all judicially noticed matters, and all pleadings and papers on file in this
 9 action, on the reply, if any, that may be filed with the Court, and on any and such further oral and
 10 documentary evidence as may be presented at the hearing on this matter.

11 CMI moves to dismiss Plaintiff's entire FAC on the basis that Plaintiff has failed to state a
 12 claim upon which relief may be obtained.

13 DATED: August 10, 2009

WOLFE & WYMAN LLP

14 By: _____
 15 
 16 STUART B. WOLFE
 17 NATILEE S. RIEDMAN
 18 Attorneys for Defendant
 19 CITIMORTGAGE, INC.

TABLE OF CONTENTS

		<u>Page</u>
1	I. INTRODUCTION	1
2	II. SUMMARY OF PLAINTIFF'S ALLEGATIONS	1
3	A. WSB LOAN.....	2
4	B. INDYMAC LOAN	3
5	III. LAW & ARGUMENT.....	4
6	A. LEGAL AUTHORITY FOR A 12(B)(6) MOTION TO DISMISS	4
7	B. PLAINTIFF FAILS TO ALLEGE ANY CONDUCT BY CMI, LET ALONE FACTS WARRANTING VICARIOUS LIABILITY	5
8	C. PLAINTIFF FAILS TO ALLEGE FACTS DEMONSTRATING AN INABILITY TO UNDERSTAND THE PRINTED LOAN DOCUMENTS	6
9	D. THE FACTUAL BASIS ON WHICH PLAINTIFF'S CLAIMS ARE BASED IS IMPERMISSIBLY SPECULATIVE	7
10	E. PLAINTIFF'S ALLEGATIONS WHICH ARE SOUNDED IN FRAUD SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO SATISFY THE HEIGHTENED PLEADING STANDARD	7
11	F. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR RESCISSION	8
12	G. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR FINANCIAL ABUSE OF A DEPENDENT ADULT	10
13	1. Plaintiff's Claim Is Pre-empted by the Home Owners' Loan Act	10
14	2. Plaintiff Fails to Allege Facts Sufficient to State a Claim against CMI	10
15	H. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING	11
16	I. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR VIOLATION OF THE TRUTH IN LENDING ACT.....	12
17	1. Plaintiff's Allegations Run contrary to Judicially Noticeable Documentary Evidence	12
18	2. Plaintiff Is Not Entitled to Rescission under TILA	13

TABLE OF CONTENTS

		Page
2	3. Plaintiff's Claim for Damages Is Barred by the Statute of Limitations.....	14
3	J. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A	
4	CLAIM FOR VIOLATION OF THE UNFAIR COMPETITION ACT.....	14
5	1. Plaintiff's Claim Is Pre-empted by HOLA	14
6	2. Plaintiff Fails to Allege Facts Sufficient to State a Claim.....	15
7	K. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A	
8	CLAIM FOR UNFAIR COMPETITION AGAINST A DISABLED PERSON	15
9	L. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A	
10	CLAIM FOR DECLARATORY RELIEF.....	16
11	M. MOTION FOR A MORE DEFINITE STATEMENT.....	17
12	IV. CONCLUSION.....	18



TABLE OF AUTHORITIES

<u>TABLE OF AUTHORITIES</u>		<u>Page</u>
2	Cases	
3	<u>Balistreri v Pacifica Police Dept.</u> 901 F.2d 696, 699 (9th Cir. 1990)	4
4		
5	<u>Bell Atlantic Corp. v. Twombly</u> 127 S.Ct. 1955, 1964-1965 (2007)	4
6		
7	<u>Benun v. Superior Court</u> (2004) 123 Cal.App.4th 113, 119	10
8		
9	<u>Berryman v. Merit Property Management, Inc.</u> (2007) 152 Cal.App.4th 1544, 1554	15
10		
11	<u>C.J.L. Const. Inc. v. Universal Plumbing</u> (1993) 18 Cal.App.4th 376, 390	16
12		
13	<u>Cal. Emergency Physicians Med. Group v. Pacificare of Cal.</u> (2003) 111 Cal.App.4th 1127, 1133	15
14		
15	<u>California Ins. Guar. Assn'n v. Sup. Ct. (Jakes)</u> (1991) 231 Cal.App.3d 1617, 1623-24	17
16		
17	<u>Careau & Co. v. Security Pacific Business Credit, Inc.</u> (1990) 222 Cal.App.3d 1371, 1393-99	12
18		
19	<u>City of Cotati v. Cashman</u> (2002) 29 Cal.App.4th 69, 80	16
20		
21	<u>Copesky v. Superior Court</u> (1991) 229 Cal.App.3d 678, 689-90	12
22		
23	<u>Cosio v. Simental</u> 2009 WL 201827, 2-5 (C.D.Cal. 2009)	10
24		
25	<u>Del E. Webb Corp. v. Structural Materials Co.</u> (1981) 123 Cal.App.3d 593, 604	13
26		
27	<u>Freeman & Mills, Inc. v. Belcher Oil Co.</u> (1995) 11 Cal.4th 85, 93-95	12
28		
29	<u>Holywell Corp v. Smith</u> (1992) 503 U.S. 47, 57	6
30		
31	<u>Hubbard v. Fidelity Federal Bank</u> 91 F.3d 75, 79 (9th Cir. 1996)	14
32		
33	<u>Kearns v. Ford Motor Co.</u> 2009 U.S.App. LEXIS 12289 (9th Cir.Cal. June 8, 2009)	8
34		
35	<u>King v. California</u> 784 F.2d 910, 915 (9th Cir. 1986)	14
36		

TABLE OF AUTHORITIES

		Page
2	<u>Lesperance v. North American Aviation, Inc.</u> (1963) 217 Cal.App.2d 336, 344	8
3		
4	<u>Ludgate Ins. Co. v. Lockheed Martin Corp.</u> (2002) 82 Cal.App.4th 592, 605	16
5		
6	<u>Murillo v. Lehman Brothers Bank FSB</u> 2009 WL 2160578, 4 (N.D.Cal. 2009)	15
7		
8	<u>Neet v. Holmes</u> (1944) 25 Cal.2d 447, 456-57	9
9		
10	<u>NL Industries, Inc. v. Kaplan</u> 792 F.2d 896, 898 (9th Cir. 1986)	4
11		
12	<u>Northstar International v. Arizona Corp. Commission</u> 720 F.2d 578, 583 (9th Cir. 1983)	4, 5
13		
14	<u>Pareto v. F.D.I.C.</u> 139 F.3d 696, 699 (9th Cir. 1998)	4
15		
16	<u>Peterson Dev. Co. v. Torrey Pines Bank</u> (1991) 233 Cal.App.3d 103, 116-119	5
17		
18	<u>Pittenger v. Home Sav. & L. Ass'n.</u> (1958) 166 Cal.App.2d 32, 36	16
19		
20	<u>Price v. Wells Fargo Bank</u> (1989) 213 Cal.App.3d 465, 476	12
21		
22	<u>Randas v. YMCA of Metropolitan Los Angeles</u> (1993) 17 Cal.App.4th 158, 163	7, 9
23		
24	<u>Richards v. Harper</u> 864 F.2d 85, 88 (9th Cir. 1988)	4
25		
26	<u>Robertson v. Dean Witter Reynolds, Co.</u> 749 F.2d 530, 534 (9th Cir. 1984)	4
27		
28	<u>Smith v. San Francisco</u> (1990) 225 Cal.App.3d 38, 49	11
29	<u>Stansfield v. Starkey</u> (1990) 220 Cal.App.3d 59, 73	8
30		
31	<u>Stribling v. Mailliard</u> (1970) 6 Cal.App.3d 470, 475	16
32		
33	<u>Tarmaann v. State Farm Mutual Auto Ins. Co.</u> (1991) 2 Cal.App.4th 153, 157	8
34		
35	///	

TABLE OF AUTHORITIES

Page		
2	<u>Unterberger v. Red Bull North America, Inc.</u> (2008) 162 Cal.App.4th 414, 421	6
3		
4	<u>Wagner v. Benson</u> (1980) 101 Cal.App.2d 27, 34	12
5		
6	<u>Warren et. al. v. Fox Family Worldwide, Inc. et. al.</u> 171 F. Supp. 2d 1057, 1066 (CD Cal. 2001).....	4
7		
8	<u>Western Mining counsel v. Watt</u> 643 F.2d 618, 624 (9th Cir. 1981)	5
9		
10	<u>Wilhelm v. Pray, Price, Williams & Russell</u> (1986) 186 Cal.App.3d 1324, 1331	8
11		
12	<u>Wyatt v. Union Mortgage Co.</u> (1979) 24 Cal.3d 773, 782	5
13		
14	Statutes	
15	12 C.F.R. 226.23(a)(3).....	13
16		
17	12 C.F.R. §§ 560.2	10
18		
19	15 U.S.C. § 1640(e)	14
20		
21	Business & Professions Code § 17200	1, 14, 15
22		
23	Business & Professions Code § 17206.1	15
24		
25	Cal. Civ. Code § 1632.....	1
26		
27	Cal. Civ. Code § 1670.5.....	14
28		
29	Cal. Civ. Code § 1689.....	9
30		
31	Cal. Civ. Code § 1691(b)	9
32		
33	Cal. Civ. Code. § 1989(b) (1)	9
34		
35	Cal. Welfare & Institutions Code § 12955.3.....	11
36		
37	Cal. Welfare & Institutions Code § 15610.23.....	11
38		
39	Cal. Welfare & Institutions Code § 15610.30.....	10
40		
41	California Finance Code § 4979.5(a).....	5
42		
43	FRCP Rule 12(e).....	17
44		
45	FRCP Rule 12(g).....	17

TABLE OF AUTHORITIES

	<u>Page</u>
FRCP Rule 12(b)(6)	4
 Other Authorities	
4 Miller & Starr, <u>Cal. Real Estate</u> 3d Ed. § 3:35, pg. 208	11



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 14, 2009, Plaintiff filed a FAC, asserting causes of action for: (1) rescission/cancellation; (2) violation of California Civil Code § 1632; (3) financial abuse of a dependent adult; (4) fraud; (5) breach of covenant of good faith and fair dealing; (6) breach of fiduciary duty; (7) aiding and abetting; (8) negligent supervision; (9) violation of the Truth in Lending Act; (10) violation of Business and Professions Code § 17200; (11) unfair competition against a disabled person; and (12) declaratory relief. Only Plaintiff's first, third, fifth, and ninth through twelfth causes of action are alleged as against CMI.

The FAC contains allegations regarding two separate loans, each of which involved entirely different parties. Moreover, Plaintiff fails to allege any conduct, let alone misconduct by CMI which would support a claim. As more fully detailed below, Plaintiff fails to state any claim on which relief can be granted. Accordingly, CMI respectfully requests that the Court grant its Motion to Dismiss without leave to amend.

II. SUMMARY OF PLAINTIFF'S ALLEGATIONS

This action arises from a loan origination dispute relating to (1) a loan funded by co-defendant World Savings Bank (“WSB”) (hereinafter “WSB Loan”) for the purchase of the real property located at 1119 Cobblestone Street, Salinas, CA (“Subject Property”) and (2) another loan funded by co-defendant Indymac Bank (“Indymac”) for the purpose of refinancing the WSB Loan (hereinafter “Subject Loan”).

Plaintiff alleges that he is “deaf and mute and requires a deaf language interpreter for proper communication.” (FAC ¶¶ 1, 19). Plaintiff alleges that “at all relevant times” he expressed his need for an interpreter but that none was provided.” (FAC ¶ 20). Plaintiff does not specify any particular occasion(s) on which he requested an interpreter. Nor does Plaintiff specify any particular entity or person to whom he made such a request, despite the fact that Plaintiff purportedly interacted with numerous persons and entities and with respect to two entirely different loans.

Plaintiff alleges that “at all times relevant to this action,” Plaintiff was accompanied by his brother. (FAC ¶ 21). Plaintiff alleges that each party who played a role in originating the WSB

1 Loan communicated in Spanish with his brother, who is monolingual. (FAC ¶ 40). Plaintiff does
 2 not specify whether he, himself is monolingual.

3 **A. WSB LOAN**

4 Plaintiff alleges no connection between CMI and the WSB Loan. Plaintiff alleges that co-
 5 defendants Jose Palma Inc., Joe Villarreal Palma, Prudential Realty, Realty World Countrywide and
 6 Victoria Mortgage (collectively “Palma Defendants”) each played a role in the origination of the
 7 WSB Loan as either a mortgage broker or real estate agent. (FAC ¶¶ 3-5). Plaintiff alleges that co-
 8 defendants Jose Reyes and Ramiro Acala were the designated broker and owner, respectively, of
 9 Cornerstone Financial Group. (FAC ¶¶ 6-7) Plaintiff alleges that co-defendant World Savings Bank
 10 (hereinafter “WSB”) funded the WSB Loan and that Wachovia Bank is WSB’s successor in interest.
 11 (FAC ¶ 8). Plaintiff alleges that co-defendant Wells Fargo Bank acquired Wachovia in December
 12 2008. (*Id.*). Plaintiff alleges that Chicago Title Company provided escrow and settlement services
 13 for WSB. (FAC ¶ 10).

14 Plaintiff alleges that he purchased the Subject Property on May 15, 2009 for \$590,000.00.
 15 (FAC ¶ 29). Plaintiff alleges that he was provided with four different payment options, and that the
 16 one he ultimately selected featured low monthly payments that resulted in negative amortization.
 17 (FAC ¶ 33). Plaintiff alleges that the WSB Loan was an adjustable rate mortgage which was
 18 comprised of a first loan in the amount of \$442,500.00 and a second loan which was an open end
 19 equity line of credit with a maximum of \$88,500.00. (FAC ¶ 32). Plaintiff alleges that the Palma
 20 Defendants falsified his income in applying for the WSB Loan. (FAC ¶ 31). Plaintiff also alleges
 21 that “[t]he defendants” knew he was a dependent adult who was unemployed with his only source of
 22 income amounting to \$1,259.00. (FAC ¶ 31). Accordingly, Plaintiff alleges that the defendants
 23 knew he could not afford the WSB Loan. (*Id.*).

24 Plaintiff alleges that Reyes, Acala, WSB and the Palma Defendants: (1) misrepresented the
 25 costs and terms of the WSB Loan, (2) failed to provide proper notices and disclosures, (3) collected
 26 and charged excessive fees, (4) failed to communicate the terms, nature and effect of the WSB Loan
 27 and (5) misled Plaintiff into believing that he was obtaining a fixed rate loan that he could afford.
 28 (FAC ¶ 35).

1 **INDYMAC LOAN**

2 Plaintiff alleges that co-defendant Atlas Mortgage Services (hereinafter “Atlas”) acted as the
 3 mortgage broker “with Indymac.” (FAC ¶ 11). Plaintiff alleges that defendant Robert Fernandez
 4 (hereinafter “Fernandez”) was a broker and the owner of Atlas. (Id.). Plaintiff alleges that Indymac
 5 funded the Subject Loan and that co-defendant Stewart Title Company acted as the settlement and
 6 escrow agent. (FAC ¶ 12). Plaintiff’s sole allegation with respect to CMI is that it is the successor
 7 in interest of the \$62,000.00 Second Loan described below. (FAC ¶¶ 13, 51).

8 Plaintiff alleges that, accompanied by his brother, Plaintiff met with Inez Mejia, a real estate
 9 agent for mortgage broker Atlas. (FAC ¶ 42). Plaintiff alleges that Inez communicated exclusively
 10 with his brother in Spanish and that Inez did not “communicate or attempt to communicate with
 11 Plaintiff” or provide an interpreter. (Id.). Plaintiff does not allege that he requested an interpreter on
 12 this occasion. Plaintiff alleges that “Atlas Mortgage was aware at all relevant times” that he was a
 13 dependent adult with a monthly income of \$1259.00 per month. (FAC ¶ 44). Plaintiff further
 14 alleges that Atlas and Indymac “used the same false income” that WSB used but that they should
 15 have known the income level reported on the WSB Loan application was false. (Id.). Plaintiff does
 16 not allege any facts suggesting why Indymac would have had such knowledge.

17 Plaintiff alleges that on September 21, 2006, Indymac funded two loans (collectively
 18 “Subject Loan”) for the purpose of refinancing the WSB Loan. (FAC ¶ 45). The first was funded in
 19 an amount of \$500,000.00 (hereinafter “First Loan”). (FAC ¶ 46). The second (hereinafter “Second
 20 Loan”) was funded in the amount of \$62,500.00. (FAC ¶¶ 46-47).

21 Plaintiff alleges that Atlas, Indymac and Fernandez (1) misrepresented the costs and terms of
 22 the Subject Loan, (2) failed to provide “proper notices and disclosures required by law,” (3) charged
 23 and/or received excessive fees and costs, (4) failed to properly communicate the terms, nature and
 24 effect of the Subject Loan and (5) misled Plaintiff into believing that he was obtaining a fixed rate
 25 loan. (FAC ¶ 48).

26 Plaintiff alleges that at all times, Atlas, Fernandez, Indymac and Stewart Title negotiated the
 27 terms of the Subject Loan solely with his brother in Spanish and did not offer or provide
 28 interpretation to Plaintiff. (FAC ¶ 50). Plaintiff does not specifically allege that he requested an

1 interpreter from any of these entities. Finally, Plaintiff alleges that he provided Indymac and CMI
 2 written notice of his request to rescind the Subject Loan on November 10, 2008. (FAC ¶ 52).

3 **III. LAW & ARGUMENT**

4 In light of the fact that Plaintiff makes no allegations of a relationship between CMI and the
 5 WSB Loan, where possible, CMI limits its analysis to the Subject Loan.

6 **A. LEGAL AUTHORITY FOR A 12(B)(6) MOTION TO DISMISS**

7 Federal Rule of Civil Procedure, Rule 12(b) states in relevant part that a party may assert a
 8 defense to a Complaint based on the plaintiff's failure to state a claim upon which relief can be
 9 granted. (FRCP, Rule 12(b)(6)). A motion to dismiss pursuant to Rule 12(b)(6) tests the legal
 10 sufficiency of the claim or claims stated in the Complaint. (Bell Atlantic Corp. v. Twombly, 127
 11 S.Ct. 1955, 1964-1965 (2007)). As such, the court must decide whether the Complaints alleged, if
 12 true, would entitle the plaintiff to some form of legal remedy. (Id.)

13 Therefore, a Rule 12(b)(6) motion is proper where there is either a lack of a cognizable legal
 14 theory or the absence of sufficient Complaints alleged under a cognizable legal theory. (Balistreri v
 15 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990); *see also* Robertson v. Dean Witter
 16 Reynolds, Co., 749 F.2d 530, 534 (9th Cir. 1984)).

17 In ruling on a Rule 12(b)(6) motion, the court must construe the Complaint in the light most
 18 favorable to the plaintiff, accept all well-pleaded allegations as true, and determine whether those
 19 allegations, if proved, establish a valid claim for relief. (*See Pareto v. F.D.I.C.*, 139 F.3d 696, 699
 20 (9th Cir. 1998); *see also* Bell Atlantic Corp. v. Twombly, *supra*, 127 S.Ct. at 1965, *see also* NL
 21 Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)). However, the plaintiff bears the
 22 burden of pleading Complaints sufficient to state a claim and the court will not supply a central
 23 element of a claim that a plaintiff did not plead. (Richards v. Harper, 864 F.2d 85, 88 (9th Cir.
 24 1988)). Additionally, although an amended pleading supersedes the prior, the prior pleading may be
 25 admissible in evidence against the pleader. (Warren et al. v. Fox Family Worldwide, Inc. et al., 171
 26 F. Supp. 2d 1057, 1066 (CD Cal. 2001)).

27 A dismissal is also proper if a Complaint is vague, conclusory, and fails to set forth material
 28 Complaints in support of its allegations. (Northstar International v. Arizona Corp. Commission, 720

1 F.2d 578, 583 (9th Cir. 1983)). To that end, the court need not accept as true conclusory allegations
 2 or legal characterizations. (Western Mining counsel v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).
 3 Nor need it accept unreasonable inferences or unwarranted deductions of Complaint. (Id.).

4 **PLAINTIFF FAILS TO ALLEGE ANY CONDUCT BY CMI, LET ALONE FACTS**
 5 **WARRANTING VICARIOUS LIABILITY**

6 Despite his naming CMI as a defendant, nowhere in the FAC does Plaintiff allege any
 7 conduct, let alone misconduct on the part of CMI. Plaintiff does not allege that CMI was in any way
 8 involved in the origination of any of the loans at issue or that CMI took any part in soliciting the
 9 loans, facilitating loan application completion and/or verification, or engaging in review, approval or
 10 funding of the loans. Plaintiff's sole allegation related to CMI is that it is a "successor in interest" of
 11 the Second Loan. However, Plaintiff fails to allege facts supporting even this legal conclusion.

12 Plaintiff fails to plead facts sufficient to demonstrate that CMI participated in the origination
 13 of the Subject Loan or that CMI should be held vicariously liable for the conduct of any other entity.
 14 The gravamen of Plaintiff's FAC, as it pertains to the Subject Loan, appears to be that mortgage
 15 broker Atlas failed to adequately explain the terms of the Subject Loan because it did not attempt to
 16 communicate with Plaintiff directly and did not provide a deaf language interpreter. Plaintiff fails to
 17 allege facts demonstrating that he ever communicated directly with either Indymac or CMI or that
 18 either made any representations to Plaintiff.

19 In order to hold all defendants vicariously liable for the acts of the mortgage broker, and to
 20 hold CMI liable for misconduct that allegedly occurred at the origination of the Subject Loan,
 21 Plaintiff conclusorily alleges that all of the defendants were agents of each other and entered into and
 22 acted in furtherance of a conspiracy.

23 However, California Law dictates a mortgage broker is typically considered the agent of
 24 **borrower**. (Wyatt v. Union Mortgage Co., (1979) 24 Cal.3d 773, 782, emphasis added).
 25 Specifically, a broker owes a fiduciary duty to a borrower under California Finance Code
 26 § 4979.5(a), whereas a financial institution generally owes no duty of care to a borrower, let alone a
 27 fiduciary duty. (*See Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 116-119).

28 In fact, Plaintiff alleges that he sought out the help of Atlas independent of any interaction

1 with either Indymac or CMI. (FAC ¶¶ 41-42). Plaintiff fails to allege any facts that would even
 2 suggest that Atlas was the agent of Indymac, let alone CMI or that any of said entities were involved
 3 in a conspiracy. Moreover, Plaintiff fails to allege facts suggesting that CMI would have had any
 4 knowledge of the conduct of the mortgage broker at the point of origination of the Subject Loan.

5 Moreover, Plaintiff fails to allege facts sufficient to hold CMI liable under an assignee
 6 liability theory. Even assuming arguendo that CMI was a successor in interest to the Second Loan,
 7 Plaintiff fails to allege facts demonstrating that CMI assumed any obligations purportedly imposed
 8 at the origination of the Subject Loan. An assignee is defined as one to whom a right or property is
 9 legally transferred. (Holywell Corp v. Smith, (1992) 503 U.S. 47, 53). In fact, an assignment of
 10 rights does not impose upon the assignee the obligations of the assignor under the contract unless the
 11 assignee assumes these obligations. (Unterberger v. Red Bull North America, Inc., (2008) 162
 12 Cal.App.4th 414, 421).

13 Plaintiff simply fails to state facts sufficient to show that CMI could be held liable for the
 14 actions of third parties pursuant to an assignment. Plaintiff fails to identify an assignment agreement
 15 or to identify any terms of any assignment that show CMI is a successor in interest, let alone that it
 16 assumed liability for issues arising from the origination of the Second Loan. Plaintiff further fails to
 17 identify facts showing a relationship between the mortgage brokers, the alleged wrongdoers, and
 18 CMI.

19 Based on the foregoing, Plaintiff cannot be allowed to maintain an action against CMI by
 20 simply naming CMI in the caption of the action without stating facts demonstrating conduct that
 21 would give rise to a claim against CMI. Accordingly, CMI is not an appropriate party to this action
 22 and CMI respectfully requests that it be dismissed from this action.

23 **C. PLAINTIFF FAILS TO ALLEGEE FACTS DEMONSTRATING AN INABILITY TO**
UNDERSTAND THE PRINTED LOAN DOCUMENTS

25 Despite Plaintiff's allegations that he has a hearing and/or speaking impairment, and
 26 notwithstanding Plaintiff's allegations that his brother does not understand English, Plaintiff fails to
 27 allege any facts demonstrating that his disability prevents Plaintiff himself from reading and
 28 understanding the loan documents that he signed.

1 The Deed of Trust and attached Adjustable Rate Rider relating to the First Loan, both signed
 2 by Plaintiff, clearly and conspicuously indicate that the interest rate was subject to change in October
 3 2013. (*See* Request for Judicial Notice (“RJN”), Exhibit A). The Deed of Trust and Balloon Rider
 4 relating to the Second Loan, both of which Plaintiff signed, clearly and conspicuously indicate that a
 5 balloon payment could become due in October 2021. (*See* RJN, Exhibit B). “Ordinarily, one who
 6 accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms,
 7 and cannot escape liability on the ground that he has not read it.” (Randas v. YMCA of
 8 Metropolitan Los Angeles (1993) 17 Cal.App.4th 158, 163).

9 Nevertheless, a Notice of Default relating to the Subject Loan was recorded on August 25,
 10 2008, well before the interest rate on the First Loan would become subject to change and before any
 11 balloon payment could have become due. (*See* RJN, Exhibit C).

12 D. **THE FACTUAL BASIS ON WHICH PLAINTIFF’S CLAIMS ARE BASED IS**
 13 **IMPERMISSIBLY SPECULATIVE**

14 Plaintiff’s claims are largely based on allegations that he was promised a fixed rate loan but
 15 was ultimately provided with an adjustable rate First Loan and a fixed rate Second Loan with a
 16 possible balloon payment. As a preliminary matter, the Deeds of Trust that Plaintiff signed clearly
 17 set forth these terms. Moreover, there is no way for Plaintiff to predict what the interest rate of the
 18 First Loan would have been when it became adjustable in 2013. Further, the balloon payment
 19 featured in the Second Loan was contingent on Plaintiff’s failure to pay the balance of the loan by
 20 October 2021. (*See* RJN, Exhibits A and B). Nevertheless, Plaintiff defaulted on the Subject Loan
 21 in 2008, well before the date on which the interest rate would have become adjustable in 2013 or any
 22 balloon payment could have become due in 2021. (*See* RJN, Exhibit D).

23 E. **PLAINTIFF’S ALLEGATIONS WHICH ARE SOUNDED IN FRAUD SHOULD BE**
 24 **DISMISSED BECAUSE PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO**
 25 **SATISFY THE HEIGHTENED PLEADING STANDARD**

26 Plaintiff’s claims for rescission, financial abuse of a dependent adult, breach of covenant of
 27 good faith and fair dealing, unfair business practices, unfair competition against a disabled person
 28 and declaratory relief are all grounded in their claim for fraud, which Plaintiffs do not allege as

1 against CMI.

2 Fraud actions are subject to strict pleading requirements because “allegations of fraud
 3 involve a serious attack on character, and fairness to the defendant demands that they should receive
 4 the fullest possible details of the charge in order to prepare their defense. (Lesperance v. North
 5 American Aviation, Inc. (1963) 217 Cal.App.2d 336, 344). Thus, every element of a fraud cause of
 6 action must be pled in full, factually and specifically. (Wilhelm v. Pray, Price, Williams & Russell
 7 (1986) 186 Cal.App.3d 1324, 1331). The particularity requirement necessitates pleading facts that
 8 “show how, when, where, to whom, and by what means the representations were tendered.”
 9 (Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 73). Moreover, where the defendant is a
 10 corporation, the fraud cause of action must allege specific names of the persons who made the
 11 misrepresentation, their authority to speak for the corporation, to whom they spoke to, what they said
 12 or wrote, and when it was said or written. (Tarmaann v. State Farm Mutual Auto Ins. Co. (1991) 2
 13 Cal.App.4th 153, 157).

14 In Kearns v. Ford Motor Co., 2009 U.S.App. LEXIS 12289 (9th Cir.Cal. June 8, 2009), the
 15 court found that because the plaintiff’s claims were *grounded* in fraud, the entire complaint should
 16 have been pled with particularity. (emphasis added). Therein, the Court dismissed the complaint
 17 without leave to amend because the plaintiff should have plead exactly what representations he
 18 relied upon, who made them and under what circumstances. (Id.).

19 Here, Plaintiff fails to allege facts sufficient to state a claim for fraud, let alone a claim as
 20 against CMI. Plaintiff fails to demonstrate how, when, where, to whom or by what means any
 21 representations were tendered. Plaintiff also fails to allege the specific names of the persons who
 22 made the purported representations, their authority to speak, what was said or written or when the
 23 purported representations were made.

24 Based on the foregoing, Plaintiff clearly fails to allege facts sufficient to hold CMI liable for
 25 any of the aforementioned claims which are grounded in fraud.

26 F. **PLAINTIFF FAILS TO ALLEGEE FACTS SUFFICIENT TO STATE A CLAIM FOR**
RESCISSON

27
 28 In support of his cause of action for rescission as it pertains to the Subject Loan, Plaintiff

1 alleges the Subject Loan was procured through “fraud, mistake and undue influence” because
 2 Indymac “through its agents” Atlas and Fernandez failed to disclose to Plaintiff that he was
 3 receiving an adjustable rate mortgage and would owe a balloon payment. (FAC ¶¶ 56, 58-59, 62).
 4 As set forth above, the Adjustable Rate and Balloon Riders included as parts of the Deeds of Trust,
 5 which Plaintiff signed, clearly set forth these terms. (See RJD, Exhibits A and B).

6 California Civil Code § 1689 permits rescission “if the consent of the party rescinding ...
 7 was given by mistake, or obtained through ... fraud.” (Civ. Code. § 1989(b) (1)). Notably, Plaintiff
 8 does not allege his cause of action for fraud as against CMI. Plaintiff fails to allege any conduct by
 9 CMI, let alone conduct that would satisfy the heightened pleading standard for a fraud claim.

10 Moreover, to affect a rescission, a plaintiff must “restore to the other party everything of
 11 value which he has received under the contract or offer to restore same.” (Civ. Code § 1691(b)).
 12 Here, Plaintiff has not alleged that he will restore the value he received from the Subject Loan. To
 13 the contrary, Plaintiff alleges that he does not have sufficient income to pay the monthly mortgage
 14 payments due.

15 Moreover, any allegation that Plaintiff did not understand the terms of the contract because
 16 of his hearing impairment when he signed the loan documents is not a basis for rescission. As set
 17 forth above, Plaintiff fails to plead facts demonstrating his ability to understand the written loan
 18 documents. Moreover, “ordinarily, one who accepts or signs an instrument, which on its face is a
 19 contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not
 20 read it.” (Randas v. YMCA of Metropolitan Los Angeles (1993) 17 Cal.App.4th 158, 163).

21 Finally, in order to rescind a contract, the rescinding party must have suffered some injury,
 22 prejudice or damage. (Neet v. Holmes (1944) 25 Cal.2d 447, 456-57). Here, Plaintiff defaulted on
 23 the Subject Loan before the interest rate on the First Loan would have become adjustable and well
 24 before a balloon payment could have become due. (See RJD, Exhibits A, B and C). Thus, Plaintiff
 25 fails to plead facts sufficient to demonstrate any injury, prejudice or damage.

26 ///

27 ///

28 ///

1 **G. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
 2 **FINANCIAL ABUSE OF A DEPENDENT ADULT**

3 **1. Plaintiff's Claim Is Pre-empted by the Home Owners' Loan Act**

4 California Courts have held that California's Elder Abuse and Dependent Adult Civil
 5 Protection Act ("Dependent Adult Protection Act") is pre-empted by the Home Owners' Loan Act of
 6 1933 ("HOLA") where the conduct alleged is related to lending practices, operations, and charges.
 7 (Cosio v. Simental 2009 WL 201827, 2-5 (C.D.Cal. 2009); 12 C.F.R. §§ 560.2, 560.2(b)).

8 **2. Plaintiff Fails to Allege Facts Sufficient to State a Claim against CMI**

9 Even if the Dependent Adult Protection Act is not pre-empted, Plaintiff fails to plead facts
 10 sufficient to hold CMI liable. Under the Dependent Adult Protection Act, financial abuse of a
 11 dependent adult means a situation where all of the following conditions are satisfied: (1) a dependent
 12 adult requests that a third party transfer property that belongs to the dependent adult or is held in
 13 express trust for the dependent adult, of which the third party has control or possession; (2) despite
 14 the dependent adult's request for transfer of the property, the third party, without good cause, either
 15 continues to hold the property or fails to take reasonable steps to make the property readily available;
 16 and (3) the third party committed the acts described above in bad faith. (4 Miller & Starr, Cal. Real
 17 Estate, 3d Ed. § 3:35, pg. 208; Cal. Welfare & Institutions Code § 15610.30).

18 A third party shall be deemed to have acted in bad faith if the third party either knew or
 19 should have known that the dependent adult had the right to have the property transferred or made
 20 readily available. (Id.). A third party should have known of this right if, on the basis of the
 21 information received by the dependent adult, it is obvious to a reasonable person that the dependent
 22 adult had this right. (Id.). Moreover, California Courts have held that, to establish financial abuse
 23 under the aforementioned act, a plaintiff must show that the defendant was guilty of recklessness,
 24 oppression, fraud or malice. (Benun v. Superior Court (2004) 123 Cal.App.4th 113, 119).

25 Here, in support of his cause of action, Plaintiff conclusorily alleges that all defendants
 26 caused Plaintiff to "sign loans that he could not understand, and were not in his best interest"
 27 through "undue influence and fraud." (FAC ¶ 72). Notably, Plaintiff's cause of action for fraud is
 28 not alleged as against CMI, nor is his cause of action for aiding and abetting. Moreover, Plaintiff

1 fails to allege any facts indicating bad faith on CMI's part, let alone facts sufficient to satisfy the
 2 heightened pleading standard of a fraud claim. Instead, the sole allegation that Plaintiff makes with
 3 respect to CMI is that "CMI is the successor in interest to Indymac" with regard to the Second Loan.

4 Additionally, Plaintiff fails to state facts demonstrating why he should be considered a
 5 "dependent adult." Under the Dependent Adult Protection Act, a dependent adult means "any
 6 person between the ages of 18 and 64 years who resides in California and who has a physical or
 7 mental limitations that restrict his or her ability to carry out normal activities or protect his or her
 8 rights, including ...persons who have physical or developmental disabilities." (Cal. Welfare &
 9 Institutions Code § 15610.23). Here, Plaintiff simply recites this definition of a defendant adult and
 10 states that he "is a dependent adult within the meaning of California Welfare & Institutions Code
 11 § 12955.3." However, Plaintiff fails to plead facts supporting this contention and no such section of
 12 the California Welfare and Institutions Code exists.

13 **H. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

14
 15 In support of his cause of action for breach of the covenant of good faith and fair dealing,
 16 Plaintiff conclusorily alleges that all defendants owe Plaintiff a duty of good faith and fair dealing
 17 "in entering into the contracts" and that all defendants breached this duty by "misrepresenting and
 18 failing to disclose the essential terms and conditions of the loans." (FAC ¶¶ 86-87). As a
 19 preliminary matter, Plaintiff fails to establish that he was unable to understand the written loan
 20 documents that he signed, which clearly disclose the terms and conditions of which Plaintiff alleges
 21 he did not receive notice.

22 A claim for breach of implied covenant of good faith and fair dealing is derivative of a
 23 contractual relationship. (Smith v. San Francisco, (1990) 225 Cal.App.3d 38, 49). Thus, the
 24 prerequisite for any action for breach of this covenant is the existence of a contractual relationship
 25 between the parties, because the covenant is an implied term in the contract. (Smith v. San
 26 Francisco, (1990) 225 Cal.App.3d 38, 49). Here, although Plaintiff alludes to some type of contract,
 27 he fails to allege a specific contract with CMI, the terms of any such contract, or attach a copy of
 28 same. Further, the ultimate use to which loan proceeds are put is only secondarily related to the

1 immediate purpose of the contract and a contracting party is not required to totally disregard its own
 2 interests to show good faith." (Wagner v. Benson, (1980) 101 Cal.App.2d 27, 34).

3 Moreover, California courts have refused to extend the covenant of good faith and fair
 4 dealing to noninsurance cases. (See Careau & Co. v. Security Pacific Business Credit, Inc., (1990)
 5 222 Cal.App.3d 1371, 1393-99). In Freeman & Mills, Inc. v. Belcher Oil Co., (1995) 11 Cal.4th 85,
 6 93-95, the California Supreme Court held "courts should limit tort recovery in contract breach
 7 situations to the insurance area, at least in the absence of violation of an independent duty arising
 8 from principles of tort law other than denial of the existence of, or liability under, the breached
 9 contract."

10 California courts have also specifically refused to extend the tort of breach of the covenant of
 11 good faith and fair dealing to financial institutions. (Price v. Wells Fargo Bank (1989) 213
 12 Cal.App.3d 465, 476). In Copesky v. Superior Court, (1991) 229 Cal.App.3d 678, 689-90, the court
 13 exhaustively reviewed the viability of tort actions in a creditor-debtor relationship, finding that
 14 "there is only one category of business transactions which definitely is amenable to actions for
 15 contract breaches, and that is insurance."

16 Based on the foregoing, Plaintiff fails to state a claim for breach of the covenant of good faith
 17 and fair dealing.

18 **I. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
VIOLATION OF THE TRUTH IN LENDING ACT

19
 20 **1. Plaintiff's Allegations Run contrary to Judicially Noticeable Documentary**
Evidence

21
 22 In his ninth cause of action, Plaintiff requests damages and rescission of the Subject Loan
 23 under the Truth in Lending Act ("TILA"). (FAC ¶ 114). In support of his cause of action for
 24 violation of TILA as it pertains to the Subject Loan, Plaintiff alleges that Indymac (1) provided a
 25 defective notice of his right to cancel the First Loan on September 21, 2006 because the notice "used
 26 the incorrect date of September 18, 2006"; (2) failed to provide Plaintiff with the appropriate notice
 27 of his three day right to cancel the Second Loan; and (3) failed to provide Plaintiff with "the
 28 appropriate disclosures required under TILA, including but not limited to failing to disclose the

1 annual percentage rate.” (FAC ¶¶ 112-113).

2 However, Plaintiff’s allegations run contrary to judicially noticeable evidence. Though the
 3 notice of right to cancel was originally dated September 18, 2009 and stated that the right to cancel
 4 expired on September 21, 2009, the document that Plaintiff signed contains handwritten corrections,
 5 each of which is initialed by Plaintiff. (See RJD, Exhibit D). The handwritten corrections indicate
 6 that the date of the transaction was September 21, 2009, which was the date of Plaintiff’s execution
 7 of the Deeds of Trust. (See RJD, Exhibits A, B and D). The corrections also indicate that the date of
 8 expiration of Plaintiff’s right to rescind was three days later on September 25, 2009. (See RJD,
 9 Exhibit D).

10 Plaintiff’s allegations regarding “appropriate disclosures” are fatally conclusory, as Plaintiff
 11 appears to simply recite various terminologies provided for in the TILA statutory scheme. Plaintiff
 12 fails to specify the particular disclosures that defendants purportedly failed to make or how any
 13 disclosures made were inappropriate. Moreover, the TILA Disclosure statement that Plaintiff signed
 14 clearly sets forth the disclosures required under TILA, including the annual percentage rate. (See RJD,
 15 Exhibit E).

16 Where facts alleged in a complaint run contrary to judicially noticeable evidence, the
 17 judicially noticeable facts control. “The courts … will not close their eyes to situations where a
 18 complaint contains allegations of fact inconsistent with attached documents, or allegations contrary
 19 to facts which are judicially noticed.” (Del E. Webb Corp. v. Structural Materials Co. (1981) 123
 20 Cal.App.3d 593, 604.) “Thus, a pleading valid on its face may nevertheless be subject to a motion to
 21 dismiss when attached documents or matters judicially noticed by the court render the complaint
 22 meritless.” (Id.).

23 **2. Plaintiff Is Not Entitled to Rescission under TILA**

24 “The consumer may exercise the right to rescind until midnight of the third business day
 25 following consummation, delivery of the notice required by paragraph (b) of this section, or delivery
 26 of all material disclosures, whichever occurs last.” (12 C.F.R. 226.23(a)(3)). Here, Plaintiff admits
 27 that the consummation of the transaction occurred on September 21, 2006 and that he received the
 28 notice of the right to rescind at that time. (FAC ¶ 45; *See also* RJD, Exhibits D and E). As such, the

1 right to rescind would extend only to midnight September 24, 2006. However, Plaintiff admits that
 2 he did not attempt to rescind until November 10, 2008. (FAC ¶ 52).

3 **3. Plaintiff's Claim for Damages Is Barred by the Statute of Limitations**

4 Even if Plaintiff had alleged facts sufficient to state a claim, any claims for damages under
 5 TILA would be barred by the statute of limitations. Under § 1640, an action must be brought within
 6 one year of the alleged violation to recover damages under TILA. (15 U.S.C. § 1640(e); Hubbard v.
 7 Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996)). The limitations period runs from the date of
 8 the consummation of the transaction, i.e. the time that a consumer becomes contractually obligated
 9 on a credit transaction. (See Id. [Citing King v. California 784 F.2d 910, 915 (9th Cir. 1986)]).
 10 Here, Plaintiff alleges that he entered into the Subject Loan on September 21, 2006. Thus, the
 11 statute of limitations expired on September 21, 2007. However, Plaintiff filed his FAC on May 14,
 12 2009.

13 **J. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
 14 **VIOLATION OF THE UNFAIR COMPETITION ACT**

15 In support of his tenth cause of action for violation of California's Unfair Competition Law
 16 ("UCL"), Business and Professions Code § 17200, Plaintiff alleges that because "the defendants" did
 17 not to provide him with a deaf language interpreter, Plaintiff was unaware of the essential terms of
 18 the Subject Loan and lacked meaningful opportunity to negotiate, resulting in unequal bargaining
 19 power. (FAC ¶ 117). Plaintiff further alleges that the defendants (1) made untrue or misleading
 20 representations regarding the terms and payment obligations of the Subject Loan, including the
 21 monthly payments, negative amortization and other risks; (2) failed to consider Plaintiff's ability to
 22 repay the Subject Loan; (3) aided and abetted the fiduciary duty owed by the mortgage brokers; (4)
 23 made "unconscionable loans in violation of California Civil Code § 1670.5 [providing for a court's
 24 right to refuse to enforce an unconscionable contract]; and (5) violated "statutory duties as
 25 enumerated above." (FAC ¶ 118).

26 **1. Plaintiff's Claim Is Pre-empted by HOLA**

27 Where a plaintiff's claim for violation of the UCL "is based on misrepresentations related to
 28 the loan terms or credit solicitation in disclosure or on the terms and conditions of a loan, then the

1 claim is pre-empted by HOLA". (Murillo v. Lehman Brothers Bank FSB, 2009 WL 2160578, 4
 2 (N.D.Cal. 2009)). Here, because Plaintiff's allegations speak directly to disclosures and/or
 3 representations regarding the terms and conditions of the Subject Loan, Plaintiff's claim is pre-
 4 emted.

5 **2. Plaintiff Fails to Allege Facts Sufficient to State a Claim**

6 Even if Plaintiff's claim was not pre-empted, Plaintiff still fails to allege facts sufficient to
 7 state a claim. The UCL "prohibits any 'unlawful, unfair or fraudulent business act or practice.'" (See Cal. Bus. & Prof. Code § 17200; *see also Berryman v. Merit Property Management, Inc.* (2007)
 8 152 Cal.App.4th 1544, 1554). A claim under the UCL requires the violation of an independent
 9 underlying law or statute, frequently called the "borrowed claim." (Cal. Emergency Physicians
 10 Med. Group v. Pacificare of Cal. (2003) 111 Cal.App.4th 1127, 1133).

11 Here, Plaintiff's claim is based on their allegations of fraud. However, Plaintiff's cause of
 12 action for fraud is not alleged as against CMI. As set forth above, Plaintiff fails to allege any
 13 conduct by CMI, let alone conduct that is unlawful, unfair or sufficient to satisfy the heightened
 14 pleading standard for a fraud claim. Plaintiff also fails to allege facts sufficient to hold CMI
 15 vicariously liable for the conduct of any other entity or for any liability born out of a fiduciary duty
 16 owed by the mortgage brokers.

17 **K. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
UNFAIR COMPETITION AGAINST A DISABLED PERSON

18 Notwithstanding his failure to allege a claim for violation of the UCL, in his eleventh claim,
 19 Plaintiff seeks to impose additional penalties under the UCL for violations against a disabled person
 20 under Business and Professions Code § 17206.1. In determining whether to impose a civil penalty
 21 under § 17206.1, the court shall consider, among other things (1) whether the defendant knew or
 22 should have known that its conduct was directed to a disabled person; (2) whether the defendant's
 23 conduct caused the disabled person to suffer loss or encumbrance of a primary residence; and (3)
 24 whether the disabled person actually suffered substantial damage resulting from the defendant's
 25 conduct. (Bus. And Prof. Code § 17206.1). Here, Plaintiff fails to allege any specific conduct by
 26 CMI. Even if Plaintiff had alleged conduct by CMI, Plaintiff fails to allege any facts demonstrating

1 that CMI knew or should have known that its conduct would have been directed to a disabled person.

2 Moreover, as set forth above, Plaintiff fails to allege that he suffered substantial damage
 3 resulting from any of the defendants' conduct, let alone CMI's. Plaintiff's claim for violation of the
 4 UCL is based on purported representations by the mortgage broker that he would receive a fixed rate
 5 loan. However, Plaintiff defaulted on the Subject Loan well before the initial fixed rate period was
 6 to expire in 2013. (See RJN, Exhibits A and D).

7 **L. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR**
DECLARATORY RELIEF

9 In support of his cause of action for declaratory relief, Plaintiff conclusorily alleges that "an
 10 actual controversy exists between plaintiff and the defendants concerning their respective rights and
 11 duties in that the loans are invalid because the defendants failed to provide plaintiff with a deaf
 12 language interpreter and otherwise misled plaintiff." (FAC ¶ 131).

13 A complaint for declaratory relief is sufficient "if it sets forth facts showing the existence of
 14 an actual controversy relating to the legal rights and duties of the respective parties under a written
 15 instrument ... and requests that the rights and duties of the parties be adjudged by the court."
 16 (Ludgate Ins. Co. v. Lockheed Martin Corp. (2002) 82 Cal.App.4th 592, 605). "[The] actual, present
 17 controversy must be pleaded *specifically* and the facts of the respective claims concerning the
 18 [underlying] subject must be given." (Emphasis original). (City of Cotati v. Cashman (2002) 29
 19 Cal.App.4th 69, 80). The trial court has discretion to dismiss a claim without leave to amend where
 20 the complaint reveals no controversy exists. (Stribling v. Mailliard (1970) 6 Cal.App.3d 470, 475;
 21 *see also* Pittenger v. Home Sav. & L. Ass'n (1958) 166 Cal.App.2d 32, 36).

22 Here, Plaintiff fails to properly allege a claim for declaratory relief because he fails to allege
 23 any instrument pursuant to which Plaintiff wishes to have his rights or duties declared with respect to
 24 CMI. Moreover, as set forth throughout the instant Motion to Dismiss, Plaintiff fails to allege facts
 25 which demonstrate the existence of an actual present controversy, as Plaintiff fails to allege any
 26 conduct by CMI, let alone conduct that would give rise to such a claim.

27 Moreover, the availability of another form of adequate relief justifies denial of declaratory
 28 relief (C.J.L. Const. Inc. v. Universal Plumbing (1993) 18 Cal.App.4th 376, 390). A declaratory

1 relief action will not lie to determine issues raised in other causes of action before the court as “the
 2 object of the [declaratory relief] statute is to afford a new form of relief where needed and not to
 3 furnish a litigant with a second cause of action for the determination of identical issues.” California
 4 Ins. Guar. Assn’n v. Sup. Ct. (Jakes) (1991) 231 Cal.App.3d 1617, 1623-24). Here, Plaintiff simply
 5 wants an assertion that the Subject Loan is invalid and/or was obtained through fraud. As this is the
 6 outcome sought in Plaintiff’s other causes of action, Plaintiff’s claim for declaratory relief must be
 7 refused as the issues raised therein are already before the court.

8 **M. MOTION FOR A MORE DEFINITE STATEMENT**

9 Alternatively, CMI brings this Motion for a More Definite Statement as it cannot ascertain
 10 the nature of the claims being asserted in Plaintiff’s FAC. Federal Rule of Civil Procedure, Rule 12
 11 provides that “a party may move for a more definite statement of a pleading to which a responsive
 12 pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a
 13 response.” (FRCP Rule 12(e)). Federal Rules of Civil Procedure permit a more definite statement to
 14 be joined with the motion to dismiss as set forth hereinabove. (FRCP Rule 12(g)).

15 In addition to Plaintiff’s failure to state facts sufficient to constitute their various claims as
 16 discussed above, Plaintiff’s allegations are wholly uncertain and ambiguous. For example, Plaintiff
 17 names CMI as a defendant, yet fails to allege any misconduct on its part. Moreover, the FAC alleges
 18 facts pertaining to two entirely different loans, each of which involves completely different entities.
 19 However, Plaintiff alleges various instances of conduct as though they were carried out by all
 20 defendants as a group without specifying which defendant is purportedly responsible or to which
 21 loan such conduct is related.

22 Plaintiff’s generalized claims as against the distinct and separate entity defendants prevents
 23 them from responding to the various allegations made, as none of them can fully ascertain what
 24 claims are being made against each defendant. Thus, CMI is deprived of the ability to assert any
 25 appropriate defenses. Accordingly, CMI respectfully requests that this Court grants its Motion for a
 26 More Definite Statement of the FAC and claims sought in alternative to the Motion to Dismiss.

27 ///

28 ///

IV. CONCLUSION

Based on all of the foregoing reasons, those to be set forth in the Reply (if any) and at oral argument on this matter, CMI respectfully requests that this Court grant their Motion to Dismiss, in its entirety and without leave to amend. In the alternative, CMI requests that this Court grant its Motion for a More Definite Statement.

DATED: August 10, 2009

WOLFE & WYMAN LLP

By:

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The logo for Wolfe & Wyman LLP features a stylized 'W' composed of two overlapping 'V' shapes, with the 'Wolfe & Wyman LLP' and 'ATTORNEYS & COUNSELORS AT LAW' text stacked vertically to its right.